Case No. 47474-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION II

FIRST NATIONAL BANK OF OMAHA,

Plaintiff-Appellee

vs.

David T. Gilchrist,

Defendant-Appellant.

Appeal from an Order of the Cowlitz County Superior Court
Case No. 14-2-00156-9

APPELLANT'S REPLY BRIEF

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VERBATIM REPORT OF PROCEEDINGS

ARGUMENT

Before arguing against the Appellee's response, the Appellant would like to refresh the court on the real issue at play. In order to do that, a look at First National Bank of Omaha's (hereinafter FNBO) complaint is most helpful. The Complaint has 9 sentences, 2 of those 9 sentences show the essence of all that we are arguing. They are the following:

- 6. As a result of the terms of "the agreement", the defendant agreed by use of said credit account (1) to assume responsibility for all credit extended on the basis of said credit account, and (2) to make regular monthly payments. [emphasis mine]
- 8. Although demand has repeatedly been made upon the defendant for the unpaid balance of $4,302.44 on said credit account, the defendant is now in "default" under the terms and conditions of "the agreement". [emphasis mine]

There are three very important claims that First National Bank of Omaha made in their Complaint.

1. THERE IS A PARTICULAR, SPECIFICALLY DATED TERMS & ACCOUNT AGREEMENT

The first claim is that there was a set of terms of a particular agreement. The Appellee's Complaint never made claims of some general

past agreement(s), neither did they present past agreements before the court as evidence, but rather the Complaint emphasized "the" agreement in their Complaint, which was eventually presented at Summary Judgment and sworn to in the affidavit by Scot Mayo. The word "the" predicating the word agreement in the Complaint indicates particularity, not alleged past general agreement(s). In support of this argument the Appellant argues that the Affidavit also indicates particularity when the affiant stated under oath that "the" "agreement" it referred to was attached (though the agreement sworn to was never attached to the affidavit)

2. THE COMPLAINT CLAIMS THE TERMS & ACCOUNT AGREEMENT WERE ASSENTED TO

The second claim is that the agreement was assented to by use of said credit account. This claim rests entirely on the first claim in that in order for the Appellant to have assented to "the" agreement, the agreement would had to have been received by the Appellant sometime before his alleged account was closed by the First National Bank of Omaha. Then purchases would had to have been made in order to assent to April 2013 "agreement". If the Appellant's argument emphasizing particularity with the "agreement" is true, then it would have been impossible for "the" "agreement", alleged in the Complaint, to have been assented to. A

question to consider is this; If the trial court determined that the April 2013 agreement presented to as evidence and sworn to by the witness Scot Mayo did not apply for summary judgment, then what was the factual evidence presented at summary judgment that gave relief for the claim in the Complaint? The Complaint was for a default of the April 2013 agreement which was supposed to be attached to the affidavit.

3. THE COMPLAINT CLAIMS THERE WAS A DEFAULT OF THE PARTICULAR, SPECIFICALLY DATED TERMS & ACCOUNT AGREEMENT AS STATED BY SCOT MAYO.

The third claim is found in paragraph 8 of the complaint which is that the Appellant defaulted under the terms and conditions of the agreement. Though the default claim rests on the the allegation that there was a specific agreement and that it was assented to, the default claim is the most important because it is this default claim that, if true, allows for a justiciable action. The allegation of a default is the essence of this case, not alleged debt. The most important claim to prove of any civil case is a breach of duty. Whether that duty is to your fellow man under the common law or natural law, or whether you agreed to contract with another party based upon an evidenced agreement. If no breach of duty, or in this case a default, can be shown to exist then the court has no subject

matter jurisdiction and First National Bank of Omaha has no claim to state for relief. If there is no breach, then no summary judgment can issue. So this entire case pivots on one document; the April 2013 agreement. Did the April 2013 agreement presented at summary judgment as evidence represent all alleged past agreements of FNBO? Does the Truth In Lending Act confirm the same notion that one dated agreement is the same as another differently dated agreement? Can hearsay statements of counsel be used to speculate that alleged past dated agreements were assented to, thereby making the April 2013 irrelevant? Does any court have the authority to use immaterial and speculative statements of counsel in order to decide a case? The Appellant believes and argues that the trial court must stay within the four corners of the complaint and can only adjudicate those claims supported by authenticated evidence.

REPLY REBUTTAL OF APPELLEE'S RESPONSE

FNBO DID NOT FILE AN ACCOUNT STATED ACTION

FNBO stated that Gilchrist assented to and acknowledged the credit card account based in part on Gilchrist's online and other payments on said account and his failure to object to any of the charges. Appellant asserts that opposing counsel's statement tries to "kill two birds with one stone". The first "bird" they are attempting to "kill" is satisfying the

element of "assent", as stated in their original complaint, through assumptions and speculative statements of counsel. The second "bird" they are attempting to "kill" is getting this court to take the bait that FNBO somehow has an account stated or "implied account stated" cause of action. FNBO wanted to have their original breach of contract action on paper but when time came to presenting evidence, FNBO argued for account stated theory at summary judgment. FNBO wants to have their cake and eat it to. A Plaintiff can't change their cause of action in the middle of the fight or at the end of the fight when they think they might be losing the battle. A different theory calls for a separate action. In their response brief, FNBO continues to stress the debt of the Appellant and that he made payments and that because the Appellant never denied not owing the alleged debt, he therefore must owe the debt. FNBO argues that Gilchrist never contacted FNBO during the period he was using the credit card to question any of the account statements or charges to the account or to indicate that his card had been lost or stolen. Appellant asserts that no consumer protection law mandates that any consumer make such a claim or dispute.

Target National Bank v. Samanez, Case Nos. AR07-009777 and AR06-

009418, 156 P.L.J. 76 (Allegheny Cty. C.P. December 26, 2007),

In his conclusion, Judge Wettick held that, "if cardholders cannot be expected to know whether the information in the monthly statement accurately states what they owe, there cannot be an express or implied agreement that their silence means that they have agreed to the amount claimed is correct."

Moore v. Maxwell, 155 Ala. 299, 46 So. 755

The Court stated: "In order to create a stated account, there must not only be a meeting of the minds as to correctness of the statement, but there must be a promise by the debtor, expressed or implied, for the payment of same. The mere admission that the items of an account are correctly stated is not sufficient, unless it appears that the debtor expressly or impliedly agreed to pay it."

In New York, General Business Law § 517 provides that: "No agreement between the issuer and the holder [of debit cards and credit cards] shall contain any provision that a statement sent by the issuer to the holder shall be deemed correct unless objected to within a specific period of time. Any such provision is against public policy and shall be of no force or effect." Also, FDCPA language (15 USC § 1692g (c)) states in

pertinent part: "The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer."

The Consumer Financial Protection Bureau (CFPB) stated in their CFPB Bulletin 2013-07 that federal debt collection law now applies to all consumer debt collection activities conducted by any financial institution regulated by the Dodd-Frank Act. This includes alleged creditors like FNBO. Please see the following web address for the CFPB Bulletin 2013-07.

http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf

FNBO asserts that billing statements support the conclusion that Gilchrist assented to the credit card agreement. This argument is conclusory because it assumes facts not in evidence. FNBO admits in their response brief that "the" agreement, that is the April 2013 agreement, was not assented to because it did not apply. Therefore we must presume that FNBO is concluding, through speculation that another agreement must have been assented to. This argument strengthens the "breach of contract" theory, but it also shows the weakness of FNBO's argument because FNBO's argument of an assented to past agreement is entirely conclusory.

FNBOs argument that the Appellant had "verified" to FNBO that "the current status" of the account and the "prior paying history" had been "reported correctly. This statement has been twisted, it has been misconstrued to make the Appellant state what in fact he did not believe or state outright. The Appellant has every right to dispute trade lines that they do not recognize. The language used in a typical credit reporting agency form letter of dispute by a consumer is often times boiler plate. However, the language the Appellant used seems to be purposefully turned on its head in order to make the Appellant's boiler plate statement of dispute into an admission of some kind.

FNBO argues that Gilchrist acknowledged in his reply to the motion for summary judgment that he received correspondence from FNBO dated March 13, 2013, indicating that his account was past due. FNBO argues again that this admission of a letter mailed to him proves that, along with the "detailed and itemized" information regarding charges and payments in the billing records, supports the existence of the debtor assent and acknowledgement required under this Court's case law. Parts of this statement by FNBO have already been addressed. However, the Appellant would like to argue a point that the Appellee brings to this court in their statement. It is true that the Appellant did receive a letter from

FNBO on March 13, 2013 indicating that the Appellant's alleged account was past due. The letter was a statement indicating an amount owed and a demand for payment. On March 22, 2013 the Appellant disputed the debt and demanded validation and also demanded competent evidence that a contractual obligation existed. On April 8, 2013 FNBO stated in the response letter that the response letter will confirm receipt of your correspondence received March 26, 2013. They stated that a card member agreement was attached but it wasn't. It is interesting to note that Scot Mayo should have had a record of this alleged agreement that could not have possibly been dated for April 2013. Why was this April 2013 agreement presented when FNBO stated in their correspondence that there was an alleged agreement prior to April 2013 in their correspondence? Also, why didn't FNBO give a proper validation of the debt and provide evidence of a contractual obligation when presented with the Appellant's March 22, 2013 dispute and demand for validation letter? Although the March 22, 2013 letter is not in the record, the reason for bringing this to this Courts attention and the reason for raising the FDCPA claims at summary judgment was because the alleged creditor under the FDCPA never met their burden of proof to show what was required of them as stated in the Fair Credit Billing Act 15 U.S.C. § 1666. As of three weeks

ago, the Appellant found the 1979 law for the first time. However, even though this might be construed by the court as newly discovered evidence, it should be noted that consumer laws intermesh with one another. Clearly the FDCPA's concept of validation of a debt is based upon other consumer laws that directly address validation and disputes, such as the FCBA. The court nor the attorney's on the other side can be ignorant of the law.

Owen v. City Of Independence , 445 U.S. 622 (1980)

Maine v Thiboutot, 448 U.S.1 (1980)

The Supreme Court stated that "You are deemed to be officers of the law; you are to advise us of the law; you can hardly claim that you in good faith for willful deprivation of the law, and you certainly can't claim ignorance of the law, because a citizen out here on the street can't claim ignorance of the law. It makes the law look foolish if an officer of the court or an officer of government does not know the law and then proceeds to abuse a citizens's constitutional rights.

These cases also state that "Where plain language of a statute supported by consistent judicial interpretation is strong, it is not necessary to look beyond the words of the statute." The Appellant asserts that FNBO's argument that the Appellant's use of an FDCPA argument is frivolous shows that FNBO is ignorant of the statutory requirements

required of them by Congress and the CFPB when an alleged consumer or alleged account holder demands validation and evidence of a contractual obligation to pay. Under strict statutory requirements of the FCBA, FNBO is restricted by statute to proceed with any attempt to collect the alleged debt until an explanation or validation is made and, if proof of a contractual obligation is requested by the consumer, then proof of the the obligation must be presented. This would include FNBO's proceeding with summary judgment. The alleged creditor, FNBO, must cease and desist all collection efforts once their claims have been disputed and challenged for an evidenced contractual obligation under the FCBA and under the FDCPA. In fact, it could be argued that if the trial court allows creditors and/or debt collectors to proceed with an action after the alleged creditor and/or debt collector has been properly presented with demands for validation and evidence of a contractual obligation by the defendant, then the trial court would be inadvertently participating with the Plaintiff in the violation of federal statutes in order for the Plaintiff to obtain money and/or property from a defendant. FNBO was confronted with demands multiple times prior to and during litigation for validation and evidence of a contractual obligation, and that this demand from the Appellant to the alleged creditor fell within the strict statutory scope of the FCBA (within

60 days of being presented with a statement or statements by the alleged creditor showing monies owed and a demand for that money). Regarding this action and the Appellant, FNBO has never once complied with the strict statutory requirements of the FDCPA and the FCBA. The fact that the Appellant did not know of the FCBA but corresponded with his alleged creditor in the same fashion that the FCBA statute requires, does not allow FNBO to claim ignorance of the law. They were and are required to meet the statutory demands of the FDCPA and FCBA regardless of whether the consumer knows of those statutes.

MOTION TO DISMISS DENIED

The one point that the Appellant would like to focus on is a point that was not entirely laid out in the Appellant's brief. The Appellant wants to focus on the statements of the trial court judge and his reasons for denying the Appellant's motion to dismiss. On page 13, paragraph 2 of the Verbatim Report, the trial court stated, "... at this point, I tend to agree there's no particular statute that's being claimed to be violated, at least I .. I didn't look at it that closely. What I focused on, mainly, on the .. presence of a contract or not." The Appellant is concerned when any trial court states that they didn't look at the complaint closely. It implies that the trial court doesn't have a firm grasp of the case, if at all. So the question before

this court is this; Can a trial court have proper jurisdiction when the trial court failed to look closely at the whole complaint? If the trial court fails to look closely at the complaint then the trial court could error in its initial understanding of the case and thus allow a case to continue when that particular case had no case to begin with. Thus, lack of subject matter jurisdiction would be in effect. When FNBO filed their complaint, the complaint was not an account stated claim. The trial court states that it recognized the action as a contractual claim. And yet, while acknowledging that the claim was a contractual claim, the court seemed to describe the complaint as one of an account stated complaint. The trial court in its explanation of the case showed it did not look closely at the complaint. The Appellant raised these issues in the hearing and explained that a specific agreement had been sworn to in an affidavit but that it was missing. The Appellant believes that FNBO's arguments addressing the Appellant's motion to dismiss arguments are not weighty enough to allow this court to give FNBO a pass and dismiss the Appellant's arguments as frivolous. Appellant requests that this court consider addressing the duties of the trial court's initial responsibility to the public and their Constitutional duties when an action is presented by a Plaintiff and the defendant raises issues such as the Appellant's.

FNBO IS ENTITLED TO ATTORNEY FEES/COSTS ON APPEAL

Based on the foregoing rebuttal arguments of the Appellant, no attorneys fees are warranted if the trial court judgment is to be reversed and remanded back to the trial court for further proceedings.

Conclusion

FNBO has shown this court that their arguments attempting to prove that the Appellant assented to some type of agreement not in evidence is speculative and conclusory and based entirely on statements of counsel. "Statements of counsel in their briefs or argument while enlightening to the Court are not sufficient for purposes of granting a motion to dismiss or summary judgment." Trinsey v. Pagliaro, 229 F. Supp. 647 - Dist. Court, ED Pennsylvania 1964. FNBO has overly emphasized debt and payments in order to attempt to turn the original breach of contract theory into an accounted stated theory action. And at the same time FNBO continues to emphasize a breach of contract theory by their constant use of the word assent. FNBO has shown in their arguments that they want two claims for the price of one. The Appellant has shown that FNBO falls under the obligations of the FDCPA as well as the FCBA and had and still has a duty to the Appellant to follow these

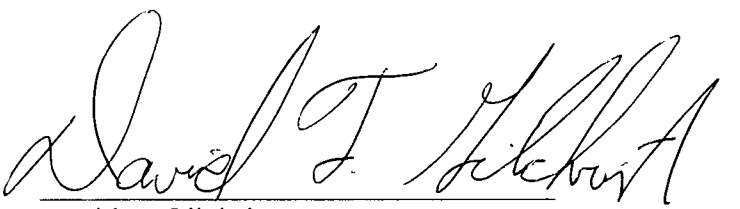
strict statutes regarding validating debt and must provide evidence of a contractual obligation to the Appellant before proceeding with summary judgment. Based on the foregoing, the Appellant has shown that the Superior Court of Cowlitz County Erred in granting summary judgment in part for monies due and for awarding attorney's fees because there are at least two disputed material facts. Lastly, the Appellant has tried to persuade this court that the Superior Court of Cowlitz County erred for failing to dismiss a claim for lack of subject matter jurisdiction based upon a lack of understanding of the complaint for failing to read the entire complaint. Thus, the Appellant's failure to state a claim and subject matter jurisdiction should have been granted.

This Court should reverse the summary judgment in part for monies due, reverse the award of attorney's fees, not allow attorney fees for Appellee's respondent counsel and dismiss the action with prejudice for lack of subject matter jurisdiction.

In the alternative, this Court should reverse the decisions of the Superior Court and remand back for further review and/or proper adjudication.

Dated March 18, 2016

Presented by:



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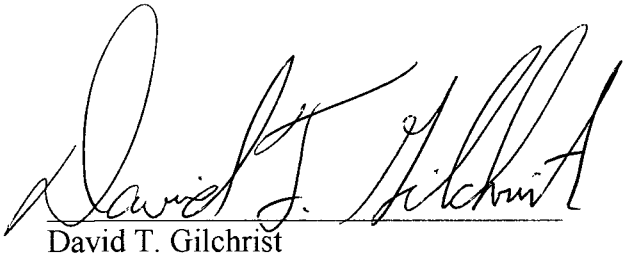
Defendant-Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that a copy of the foregoing, **APPELLANT'S REPLY BRIEF**, was mailed by certified U.S. Mail on March 18, 2013 to Michael T. Garone, of Schwabe, Williamson & Wyatt at 1211 SW Fifth Avenue, Suite 1900, Portland, OR 97204

Dated March 18, 2016

Presented by:



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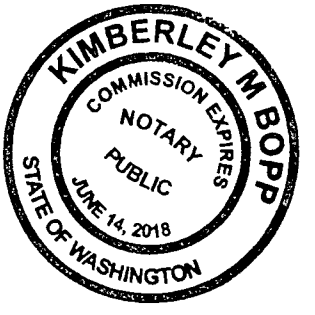
Defendant-Appellant

STATE OF WASHINGTON
COUNTY OF COWLITZ

BEFORE ME personally appeared David T. Gilchrist who, being by me first duly sworn and identified in accordance with Washington law, did execute the foregoing in my presence this 18 day of March 2016.



Kimberley M. Bopp

Notary Public

My commission expires: 06/18/2018

APPENDIX

(a) Written notice by obligor to creditor; time for and contents of notice; procedure upon receipt of notice by creditor If a creditor, within sixty days after having transmitted to an obligor a statement of the obligor's account in connection with an extension of consumer credit, receives at the address disclosed under section 1637(b)(10) of this title a written notice (other than notice on a payment stub or other payment medium supplied by the creditor if the creditor so stipulates with the disclosure required under section 1637(a)(7) of this title) from the obligor in which the obligor—

(1) sets forth or otherwise enables the creditor to identify the name and account number (if any) of the obligor,

(2) indicates the obligor's belief that the statement contains a billing error and the amount of such billing error, and

(3) sets forth the reasons for the obligor's belief (to the extent applicable) that the statement contains a billing error,

the creditor shall, unless the obligor has, after giving such written notice and before the expiration of the time limits herein specified, agreed that the statement was correct—

(A) not later than thirty days after the receipt of the notice, send a written acknowledgment thereof to the obligor, unless the action required in subparagraph (B) is taken within such thirty-day period, and

(B) not later than two complete billing cycles of the creditor (in no event later than ninety days) after the receipt of the notice and prior to taking

any action to collect the amount, or any part thereof, indicated by the obligor under paragraph (2) either—

(i) make appropriate corrections in the account of the obligor, including the crediting of any finance charges on amounts erroneously billed, and transmit to the obligor a notification of such corrections and the creditor's explanation of any change in the amount indicated by the obligor under paragraph (2) and, if any such change is made and the obligor so requests, copies of documentary evidence of the obligor's indebtedness; or

(ii) send a written explanation or clarification to the obligor, after having conducted an investigation, setting forth to the extent applicable the reasons why the creditor believes the account of the obligor was correctly shown in the statement and, upon request of the obligor, provide copies of documentary evidence of the obligor's indebtedness. In the case of a billing error where the obligor alleges that the creditor's billing statement reflects goods not delivered to the obligor or his designee in accordance with the agreement made at the time of the transaction, a creditor may not construe such amount to be correctly shown unless he determines that such goods were actually delivered, mailed, or otherwise sent to the obligor and provides the obligor with a statement of such determination. After complying with the provisions of this subsection with respect to an alleged billing error, a creditor has no further responsibility under this section if the obligor continues to make substantially the same allegation with respect to such error.

(b) Billing error For the purpose of this section, a "billing error" consists of any of the following:

(1) A reflection on a statement of an extension of credit which was not

made to the obligor or, if made, was not in the amount reflected on such statement.

(2) A reflection on a statement of an extension of credit for which the obligor requests additional clarification including documentary evidence thereof.

(3) A reflection on a statement of goods or services not accepted by the obligor or his designee or not delivered to the obligor or his designee in accordance with the agreement made at the time of a transaction.

(4) The creditor's failure to reflect properly on a statement a payment made by the obligor or a credit issued to the obligor.

(5) A computation error or similar error of an accounting nature of the creditor on a statement.

(6) Failure to transmit the statement required under section 1637(b) of this title to the last address of the obligor which has been disclosed to the creditor, unless that address was furnished less than twenty days before the end of the billing cycle for which the statement is required.

(7) Any other error described in regulations of the Bureau.

(c) Action by creditor to collect amount or any part thereof regarded by obligor to be a billing error For the purposes of this section, "action to collect the amount, or any part thereof, indicated by an obligor under paragraph (2)" does not include the sending of statements of account, which may include finance charges on amounts in dispute, to the obligor following written notice from the obligor as specified under subsection (a), if—

(1) the obligor's account is not restricted or closed because of the failure of the obligor to pay the amount indicated under paragraph (2) of

subsection (a), and

(2) the creditor indicates the payment of such amount is not required pending the creditor's compliance with this section.

Nothing in this section shall be construed to prohibit any action by a creditor to collect any amount which has not been indicated by the obligor to contain a billing error.

(d) Restricting or closing by creditor of account regarded by obligor to contain a billing error

Pursuant to regulations of the Bureau, a creditor operating an open end consumer credit plan may not, prior to the sending of the written explanation or clarification required under paragraph (B)(ii), restrict or close an account with respect to which the obligor has indicated pursuant to subsection (a) that he believes such account to contain a billing error solely because of the obligor's failure to pay the amount indicated to be in error. Nothing in this subsection shall be deemed to prohibit a creditor from applying against the credit limit on the obligor's account the amount indicated to be in error.

(e) Effect of noncompliance with requirements by creditor

Any creditor who fails to comply with the requirements of this section or section 1666a of this title forfeits any right to collect from the obligor the amount indicated by the obligor under paragraph (2) of subsection (a) of this section, and any finance charges thereon, except that the amount required to be forfeited under this subsection may not exceed $50.

(Pub. L. 90–321, title I, § 161, as added Pub. L. 93–495, title III, § 306, Oct. 28, 1974, 88 Stat. 1512; amended Pub. L. 96–221, title VI §§ 613(g), 620, Mar. 31, 1980, 94 Stat. 177, 184; Pub. L. 111–203, title X, §§ 1087,

1100A(2), July 21, 2010, 124 Stat. 2086, 2107.)

Federal Debt Collection Practices Act (FDCPA)
15 USC § 1692g(c).....6

(a) Notice of debt; contents Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing—

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a) that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the

original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector. Collection activities and communications that do not otherwise violate this subchapter may continue during the 30-day period referred to in subsection (a) unless the consumer has notified the debt collector in writing that the debt, or any portion of the debt, is disputed or that the consumer requests the name and address of the original creditor. Any collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor.

(c) Admission of liability

The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.

(d) Legal pleadings

A communication in the form of a formal pleading in a civil action shall not be treated as an initial communication for purposes of subsection (a).

(e) Notice provisions

The sending or delivery of any form or notice which does not relate to the collection of a debt and is expressly required by title 26, title V of Gramm-Leach-Bliley Act [15 U.S.C. 6801 et seq.], or any provision of Federal or State law relating to notice of data security breach or privacy, or any regulation prescribed under any such provision of law, shall not be treated

as an initial communication in connection with debt collection for purposes of this section.

(Pub. L. 90–321, title VIII, § 809, as added Pub. L. 95–109, Sept. 20, 1977, 91 Stat. 879; amended Pub. L. 109–351, title VIII, § 802, Oct. 13, 2006, 120 Stat. 2006.)

CFPB Bulletin 2013-07

http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf 6

1700 G Street, N.W., Washington, DC 20552

CFPB Bulletin 2013-07

Date: July 10, 2013 Subject: Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the

Collection of Consumer Debts

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd- Frank Act), all covered persons or service providers are legally required to refrain from committing unfair, deceptive, or abusive acts or practices (collectively, UDAAPs) in violation of the Act. The Consumer Financial Protection Bureau (CFPB or Bureau) is issuing this bulletin to clarify the contours of that obligation in the context of collecting consumer debts.

This bulletin describes certain acts or practices related to the collection of consumer debt that could, depending on the facts and circumstances, constitute UDAAPs prohibited by the Dodd-Frank Act. Whether conduct like that described in this bulletin constitutes a UDAAP may depend on additional facts and analysis. The examples described in this bulletin are not exhaustive of all potential UDAAPs. The Bureau may closely review any covered person or service provider's consumer debt collection efforts

for potential violations of Federal consumer financial laws.

A. Background

UDAAPs can cause significant financial injury to consumers, erode consumer confidence, and undermine fair competition in the financial marketplace. Original creditors and other covered persons and service providers under the Dodd-Frank Act involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act.1

In addition to the prohibition of UDAAPs under the Dodd-Frank Act, the Fair Debt Collection Practices Act (FDCPA) also makes it illegal for a person defined as a "debt collector" from engaging in conduct "the natural consequence of which is to harass, oppress, or abuse any person in connection with the collection of a debt,"2 to "use

1 *See* Dodd-Frank Act, §§ 1002, 1031 & 1036(a), codified at 12 U.S.C. §§ 5481, 5531 & 5536(a). It is also prohibited for any person, even if not a covered person or service provider, to knowingly or recklessly provide substantial assistance to a covered person or service provider in violating section 1031 of the Dodd-Frank Act. *See* Dodd-Frank Act, § 1036(a)(3), 12 U.S.C. § 5536(a)(3). The principles of "unfair" and "deceptive" practices in the Act are informed by the standards for the same terms under Section 5 of the Federal Trade Commission Act (FTC Act). *See* CFPB Examination Manual v.2 (Oct. 2012) at UDAAP 1 (CFPB Exam Manual). To the extent that this Bulletin cites FTC guidance or authority, such references reflect the views of the FTC, and are not binding upon the Bureau in interpreting the Dodd-Frank Act's prohibition on UDAAPs.

2 FDCPA § 806, 15 U.S.C. § 1692d.

any false, deceptive, or misleading representation or means in connection with the collection of any debt,"3 or to "use any unfair or unconscionable means to collect or attempt to collect any debt."4 The FDCPA generally applies to third-party debt collectors, such as collection agencies, debt purchasers, and attorneys who are regularly engaged in debt collection.5 All parties covered by the FDCPA must comply with any obligations they have under the FDCPA, in addition to any obligations to refrain from UDAAPs in violation of the Dodd-Frank Act.

Although the FDCPA's definition of "debt collector" does not include

some persons who collect consumer debt, all covered persons and service providers must refrain from committing UDAAPs in violation of the Dodd-Frank Act. 6

B. Summary of Applicable Standards for UDAAPs

1. Unfair Acts or Practices

The Dodd-Frank Act prohibits conduct that constitutes an unfair act or practice. An act or practice is unfair when:

1. (1) It causes or is likely to cause substantial injury to consumers;
2. (2) The injury is not reasonably avoidable by consumers; and
3. (3) The injury is not outweighed by countervailing benefits to consumers

   or to competition.7

A "substantial injury" typically takes the form of monetary harm, such as fees or costs paid by consumers because of the unfair act or practice. However, the injury does not have to be monetary.8 Although emotional impact and other subjective types of harm will not ordinarily amount to substantial injury, in certain circumstances emotional impacts may amount to or contribute to substantial injury.9 In addition, actual injury is not required; a significant risk of concrete harm is sufficient.10

3 FDCPA § 807, 15 U.S.C. § 1692e. This provision also imposes affirmative obligations on "debt collectors" under the FDCPA when collecting consumer debts. 4 FDCPA § 808, 15 U.S.C. § 1692f. This provision also imposes affirmative obligations on "debt collectors" under the FDCPA when collecting consumer debts.

5 *See* FDCPA § 803(6), 15 U.S.C. § 1692a(6). The FDCPA also covers, as a "debt collector," a creditor who, in collecting its own debts, uses any name other than its own which would indicate that a third person is attempting to collect the debts. 6 The FDCPA also reaches any person who designs, compiles, or furnishes forms knowing such forms would be used to create the false belief in a consumer that a person other than the creditor is participating in collecting the creditor's debts. *See* FDCPA § 812, 15 U.S.C. § 1692j.

7 Dodd-Frank Act §§ 1031, 1036, 12 U.S.C. §§ 5531, 5536. 8 CFPB Exam Manual at UDAAP 2; *see also FTC v. Accusearch, Inc.,* 06-cv-105-

D, 2007 WL 4356786, at *7- 8 (D. Wyo. Sept. 28, 2007); FTC Policy Statement on Unfairness (Dec. 17, 1980), *available at* http://www.ftc.gov/bcp/policystmt/ad-unfair.htm. 9 CFPB Exam Manual at UDAAP 2. 10 *Id.*

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An injury is not reasonably avoidable by consumers when an act or practice interferes with or hinders a consumer's ability to make informed decisions or take action to avoid that injury.11 Injury caused by transactions that occur without a consumer's knowledge or consent is not reasonably avoidable.12 Injuries that can only be avoided by spending large amounts of money or other significant resources also may not be reasonably avoidable.13 Finally, an act or practice is not unfair if the injury it causes or is likely to cause is outweighed by its consumer or competitive benefits.14

Established public policy may be considered with all other evidence to determine whether an act or practice is unfair, but may not serve as the primary basis for such determination.15

2. *Deceptive Acts or Practices* The Dodd-Frank Act also prohibits conduct that constitutes a deceptive act or

practice. An act or practice is deceptive when:

(1) The act or practice misleads or is likely to mislead the consumer; (2) The consumer's interpretation is reasonable under the circumstances;

and (3) The misleading act or practice is material.16

To determine whether an act or practice has actually misled or is likely to mislead a consumer, the totality of the circumstances is considered.17 Deceptive acts or practices can take the form of a representation or omission.18 The Bureau also looks at implied representations, including any implications that statements about the consumer's debt can be supported. Ensuring that claims are supported before they are made will minimize the risk of omitting material information and/or making false statements that could mislead consumers.

To determine if the consumer's interpretation of the information was reasonable under the circumstances when representations target a specific audience, such as older Americans or financially distressed consumers, the communication may be considered from the perspective of a reasonable

member of the target audience.19 A statement or information can be misleading even if not all consumers, or not all consumers in the targeted group, would be misled, so long as a significant minority

11 *Id.* 12 *Id.* 13 *See id.* at 2-3. 14 Dodd-Frank Act § 1031(c)(1)(B), 12 U.S.C. § 5531(c)(1)(B); *see also* CFPB Exam Manual at UDAAP 2. 15 Dodd-Frank Act § 1031(c)(2), 12 U.S.C. § 5531(c)(2); *see also* CFPB Exam Manual at UDAAP 3. 16 The standard for "deceptive" practices in the Dodd-Frank Act is informed by the standards for the same terms under Section 5 of the FTC Act. *See* CFPB Exam Manual at UDAAP 5. 17 CFPB Exam Manual at UDAAP 5. 18 *Id.* 19 *See id.* at 6.

would be misled.20 Likewise, if a representation conveys more than one meaning to reasonable consumers, one of which is false, the speaker may still be liable for the misleading interpretation.21 Material information is information that is likely to affect a consumer's choice of, or conduct regarding, the product or service. Information that is likely important to consumers is material.22

Sometimes, a person may make a disclosure or other qualifying statement that might prevent consumers from being misled by a representation or omission that, on its own, would be deceptive. The Bureau looks to the following factors in assessing whether the disclosure or other qualifying statement is adequate to prevent the deception: whether the disclosure is prominent enough for a consumer to notice; whether the information is presented in a clear and easy to understand format; the placement of the information; and the proximity of the information to the other claims it qualifies.23

3. *Abusive Acts or Practices* The Dodd-Frank Act also prohibits conduct that constitutes an abusive act or

practice. An act or practice is abusive when it:

1. (1) Materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
2. (2) Takes unreasonable advantage of – (A) a consumer's lack of understanding of the material risks, costs,

   or conditions of the product or service; (B) a consumer's inability

to protect his or her interests in selecting

or using a consumer financial product or service; or (C) a consumer's reasonable reliance on a covered person to act in

his or her interests.24

It is important to note that, although abusive acts or practices may also be unfair or deceptive, each of these prohibitions are separate and distinct, and are governed by separate legal standards.25

20 *Id.* 21 *Id.* 22 *Id.* 23 *Id.*; *see also* CFPB Bulletin 12-06, Marketing of Credit Card Add-On Products (July 12, 2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_bulletin_marketing_of_credit_card_addon_products.pdf.

24 Dodd-Frank Act § 1031(d), 12 U.S.C. § 5531(d); *see also* CFPB Exam Manual at UDAAP 9; Stipulated Final Judgment and Order, Conclusions of Law ¶ 12, 9:13-cv-80548 and Compl. ¶¶ 55-63, *CFPB v. Am. Debt Settlement Solutions, Inc.*, 9:13-cv-80548 (S.D. Fla. May 30, 2013), *available at* http://files.consumerfinance.gov/f/201305_cfpb_proposed-order_adss.pdf and http://files.consumerfinance.gov/f/201305_cfpb_complaint_adss.pdf. The Stipulated Final Judgment and Order was signed by U.S. District Judge Middlebrooks and entered on the court docket on June 6, 2013. *See* Stipulated Final J. & Order [ECF Docket Entry No. 5], 9:13-cv-80548 (S.D. Fla.).

25 CFPB Exam Manual at UDAAP 9.

C. Examples of Unfair, Deceptive and/or Abusive Acts or Practices

Depending on the facts and circumstances, the following non-exhaustive list of examples of conduct related to the collection of consumer debt could constitute UDAAPs. Accordingly, the Bureau will be watching these practices closely.

- ☒ **Collecting or assessing a debt and/or any additional amounts in connection with a debt (including interest, fees, and charges) not expressly authorized by the agreement creating the debt or permitted by law.26**
- ☒ **Failing to post payments timely or properly or to credit a**

consumer's account with payments that the consumer submitted on time and then charging late fees to that consumer.27

- ☒ **Taking possession of property without the legal right to do so.**
- ☒ **Revealing the consumer's debt, without the consumer's consent, to**

  the consumer's employer and/or co-workers.28
- ☒ **Falsely representing the character, amount, or legal status of the debt.**
- ☒ **Misrepresenting that a debt collection communication is from an attorney.**
- ☒ **Misrepresenting that a communication is from a government source or that the source of the communication is affiliated with the government.**
- ☒ **Misrepresenting whether information about a payment or non- payment would be furnished to a credit reporting agency.29**
- ☒ **Misrepresenting to consumers that their debts would be waived or forgiven if they accepted a settlement offer, when the company does not, in fact, forgive or waive the debt.30**
- ☒ **Threatening any action that is not intended or the covered person or service provider does not have the authorization to pursue, including**

26 *See* Compl. ¶¶ 34-38 & 43-44, *FTC v. Fairbanks Capital Corp.*, 03-12219 (D. Mass. Nov. 12, 2003) (alleging that the charging of late fees and other associated charges was unfair practice under Section 5 of the FTC Act and a violation of §§ 807 and 808 of the FDCPA), *available at* http://www.ftc.gov/os/2003/11/0323014comp.pdf.

27 *Id.* ¶¶ 22-25. 28 *See, e.g.*, Compl. ¶¶ 24 & 30-31, *FTC v. Cash Today, Ltd.*, 3:08-cv-590 (D. Nev. Nov. 12, 2008), *available at* http://www.ftc.gov/os/caselist/0723093/081112cmp0923093.pdf, (asserting that Cash Today engaged in unfair collection practices in

violation of Section 5 of the FTC Act by, among other things, disclosing the existence of consumer's debt to employers, co-workers, and other third parties despite being told by consumers not to contact their workplaces); *FTC v. LoanPointe, LLC.*, 2:10 CV 00225-DAK, 2011 WL 4348304, at *5 -6 (D. Utah Sept. 16, 2011) (finding that disclosure of existence and amount of debt to consumer's employer without consumer's prior approval constitutes an unfair practice under the FTC Act).

29 *See, e.g., In re Am. Express Centurion Bank*, Joint Consent Order at 3 (Oct. 1, 2012), *available at* http://files.consumerfinance.gov/f/2012-CFPB-0002-American-Express-Centurion-Consent-Order.pdf. 30 *Id.*

false threats of lawsuits, arrest, prosecution, or imprisonment for non-payment of a debt.

Again, the obligation to avoid UDAAPs under the Dodd-Frank Act is in addition to any obligations that may arise under the FDCPA. Original creditors and other covered persons and service providers involved in collecting debt related to any consumer financial product or service are subject to the prohibition against UDAAPs in the Dodd-Frank Act. The CFPB will continue to review closely the practices of those engaged in the collection of consumer debts for potential UDAAPs, including the practices described above. The Bureau will use all appropriate tools to assess whether supervisory, enforcement, or other actions may be necessary.